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NO. 88-1657

IN THE

Supreme Court of the United States

October Term, 1988

S.H. and P.F., et. al.,

Petitioner,

vs.

JOE EDWARDS, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. The lower courts erred in granting and affirming summary judgment to the Respondents in light of the professional judgments of Petitioners' treatment teams that they no longer needed institutionalization, and the evidence that institutionalization was harmful to them.

Petitioners do not assert a "liberty interest in habilitation in smaller commu-

nity placements." Response at 5. Rather, the Petitioners assert a constitutional right to liberty, absent a proper purpose for confinement. By attempting once again to recharacterize the issue in this case as one involving a right to community placement, Respondents have confused the issues of liability and remedy. The threshold question of constitutional liability -- that is, whether the continued, indefinite confinement of the Petitioners violates their liberty interests, in the face of allegations that they are being harmed thereby -- was also never reached by the lower courts because of their misapprehension of the nature of the Petitioners' claim. Summary judgment was granted prematurely, notwithstanding the evidence of ongoing injury to both the named plaintiffs and the class from prolonged institutionalization.

Judge Clark, in his dissent below, correctly understood this constitutional issue, when he observed that the plaintiffs had sufficiently alleged liberty interest violations to permit them to proceed to trial. For instance, he stated, "I am persuaded that a material question of fact remains as to whether members of the plaintiff class are suffering skill deterioration as a result of their continued institutionalization." S.H. v. Edwards, 860 F.2d 1045, 1061 (11th Cir. 1988). The Petitioners were never allowed to establish the injuries suffered by them by virtue of their inappropriate institutionalization, and the question of whether the institutionalization of the individual plaintiffs was justified by professional judgment sufficient to meet the standard of Youngberg v. Romeo, 457 U.S. 307 (1982) was never reached.

Whether discharge to community placements, or some other relief, would have been appropriate to remedy the violations of the Petitioners' liberty interests need not be addressed by this Court. If Petitioners' liberty interests have been violated, an appropriate remedy might - or might not - include an order requiring development of new placements. Had the Petitioners been allowed to proceed to trial and establish not only the infringement of their liberty interests, but also the damage they have suffered thereby, appropriate relief would have followed in accordance with the broad remedial powers of the district court. Cf., Parham v. J.R., 442 U.S. 584, 620 n. 23 (1979) (district court's order requiring state to provide alternative treatment facilities and programs "..more appropriate as a remedy for a substantive due process violation...")

Respondents' only answer was, and still is, that institutionalization of mentally retarded persons is generally consistent with broad professional norms. They suggest that this Court's references to professional judgment in Youngberg were intended only to assure that institutions for the mentally retarded "did not fall below the level of minimal adequacy." Response at 6. In essence, Respondents' view is that Youngberg does little more than extend Eighth Amendment-like protections to the mentally retarded. In granting and affirming summary judgment for Respondents on this issue, the lower courts agreed.

Respondents posit a standard which establishes a constitutional floor: that the institution generally meets professional standards. This minimal level of ade-

quacy, in Respondents' view, becomes the "uniform constitutional standard sought by this Court in Youngberg." Response at 11 (emphasis supplied). The Respondents' approach wholly misunderstands the role played by the professional judgment standard in Youngberg. Professionally adequate institutions are a necessary, but not a sufficient, condition of Petitioners' confinement. For a prisoner, the additional condition justifying his confinement is his arrest and/or conviction. For a mentally retarded individual, the additional condition is a professional opinion that the individual needs the services provided by an institution.

Youngberg confers on the judgment of a qualified, appropriate professional presumptive validity in justifying specific kinds of treatment, including restraints. When the treating professional reaches the

conclusion that a particular type or level of restraint is not warranted, then maintaining that restraint is unconstitutional. Cf., Parham v. J.R., 442 U.S. 584, 615 (1979) (although the determination of adequate continued hospitalization, or release, procedures were remanded to the district court, the Court noted that "...the superintendent of each hospital is charged with an affirmative statutory duty to discharge any child who is no longer mentally ill or in need of therapy.")

Under Youngberg, moreover, a professional opinion might be challenged by countervailing evidence that the judgment rendered is "a substantial departure from accepted professional judgment, practice, or standards", 457 U.S. at 323, signalling that the treatment decision was not actually based on professional judgment. In any case, once the professional opinion which

initially supported institutionalization of the individual changes, the requisite condition justifying confinement is no longer present. Continued confinement then becomes, at best, custodial, (contrary to Georgia law, which provides for institutionalization only when habilitative services needed by the individual can be provided in the institution, O.C.G.A. § 37-4-40(f)(3)), or at worst, affirmatively injurious to the individual. No "professional" opinion can support a form of "treatment" which is actually harmful to an individual, as was alleged here.

The Petitioners should have been allowed to go to trial on the issues regarding the infringement of their liberty interests and their allegations of harm from institutionalization contrary to professional judgment. In acknowledging that treating professionals prescribed discharge

for individual plaintiffs in this case, the Respondents actually underscore the inappropriateness of the entry of summary judgment in this case. Nonetheless, they continue to assert that a wholesale opinion approving a type of service for the mentally retarded in general pretermits any inquiry into liberty interest violations, and concomitant injury, by these Petitioners. This Court should clarify that the Constitution conditions restraint of an individual retarded person on the professional judgment as to that individual, and that Respondents may not simply sweep all mentally retarded persons into an insitution based on an opinion that institutionalization is "within the range" of generally accepted professional practices for the retarded.

The Respondents emphasize the Petitioners' alleged failure to show that they

do not meet the criteria for commitment. Response at 8, 12. The genesis of this lawsuit, however, was the Respondents' refusal to provide the Petitioners with the very means by which to establish that they did not meet those criteria -- periodic reviews of their need for institutionalization. Furthermore, under the Respondents' approach to the issue in this case, such a showing would be irrelevant, as institutionalization would continue to be permissible so long as it was within the broad range of professional standards. Respondents maintain they can continue to confine the Petitioners, whether they meet the commitment criteria or not. Only this Court can restore the Petitioners' hope of liberty.

II. **The lower courts erred in failing to consider whether a liberty interest is created by Georgia law, and if so whether**

it is adequately protected by the procedures provided by the Respondents.

The Respondents argue that Georgia law creates no liberty interest because there are no criteria governing the grant or denial of the "requested relief." This turns the inquiry on its head. The applicable criteria relate to the state's right to continue institutionalization, not to "grant" release. The Respondents' argument ignores the fact that the state must have a constitutionally permissible reason to confine, not a reason to release. The lower courts in this case should have determined whether the Georgia statutes in fact create a liberty interest and then what due process must be available to protect it.

In fact, as a result of this litigation, the Petitioners now get due process, in the form of periodic reviews of their need for continued institutionalization.

Still, that process is fatally flawed, because, at best, the Petitioners get placed on a waiting list for community placement. See, S.H., 860 F.2d at 1050. They get no meaningful relief in the form of an actual community placement once continued institutionalization is no longer necessary. This is true notwithstanding Georgia's assumption, in the Community Services for the Mentally Retarded Act, O.C.G.A. § 37-5 et seq., of the duty to provide community placements to all mentally retarded individuals who can benefit therefrom. On remand, the district court would be asked to evaluate the adequacy of such a procedure.

Finally, and perhaps most startlingly, the Respondents' argument concludes with the statement that it can deny access to community services for no reason at all. Response at 15. Thus the issue is framed

in this case: what are the limits to the state's ability to infringe on the Petitioners' liberty interest? If there is no limit, the Petitioners have shed their individual constitutional rights at the door of the institution. In Vitek v. Jones, 445 U.S. 480, 493 (1980), this Court held that involuntary commitment to a mental hospital was not within the range of conditions of confinement to which a prison sentence subjects an individual. Likewise, indefinite institutionalization is not within the range of conditions of confinement to which commitment to an institution for habilitation subjects a mentally retarded individual. Cf., McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249 (1972) (state cannot for all practical purposes confine one long-term without adequate procedural protections); Jackson v. Indiana, 406 U.S. 715, 729 (1972)

(..."release is appropriate when the individual no longer requires the custodial care or treatment or detention that occasioned the commitment..."). At some point, the individual's right to liberty must prevail -- wherever else that point might lie, it certainly is reached when prolonged institutionalization is injurious to the individual and contrary to the opinions of his treating professionals. This is the right which Petitioners ask this Court to affirm.

Therefore, it is respectfully submitted that the Petition for Certiorari should be granted.

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